

1)
2 Plaintiff,)
3 vs.)
4 KIAHUNA GOLF CLUB, LLC, ET)
5 AL.,)
6 Defendant.)
7)
8 SPORTS SHINKO CO., LTD., a) CV 04-00127 ACK-BMK
9 Japanese corporation in)
10 reorganization, through)
11 KEIJIRO KIMURA, its Deputy)
12 Trustee,)
13 Plaintiff,)
14 vs.)
15 OR HOTEL, LLC, a Hawaii)
16 limited liability company,)
17 Defendant.)
18)
19 SPORTS SHINKO (USA) CO.,) CV 04-00128 ACK-BMK
20 LTD., a Delaware)
21 corporation,)
22 Plaintiff,)
23 vs.)
24 MILILANI GOLF CLUB, LLC, a)
25 Hawaii limited liability)
company,)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ALAN C. KAY
UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

2 For the Plaintiffs PAUL ALSTON, ESQ.
3 and Counter Claimants: GLENN T. MELCHINGER, ESQ.
4 Alston Hunt Floyd & Ing
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5 For the Defendant: ROBERT A. MARKS, ESQ.
6 WARREN PRICE, III, ESQ.
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8 Honolulu, Hawaii 96813

9 For the Defendant and WILLIAM A. BORDNER, ESQ.
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25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 MONDAY, MARCH 20, 2006 1:30 P.M.

2 COURTROOM MANAGER: Calling Civil No. 04-00124

3 ACK-BMK, Civil No. 04-00125 ACK-BMK, Civil No. 04-00126

4 ACK-BMK, Civil No. 04-00127 ACK-BMK and Civil No. 04-00128

01:32PM 5 ACK-BMK. This is Sports Shinko Company versus various
6 defendants. This hearing has been called for KG defendants'
7 motion for summary judgment, defendant Franklin K. Mukai's
8 joinder, motion to strike joinder by defendant Mukai and also
9 the motion to strike.

01:33PM 10 Counsel, your appearances for the record, please.

11 MR. ALSTON: Good afternoon, Your Honor. Paul Alston
12 and Glenn Melchinger appearing for the plaintiffs.

13 THE COURT: Good afternoon.

14 MR. MARKS: Good afternoon, Judge Kay. Robert Marks
01:33PM 15 and Warren Price for the KG parties.

16 THE COURT: Good afternoon.

17 MR. BORDNER: William Bordner and John Reyes-Burke for
18 defendant Mukai.

19 THE COURT: Good afternoon. Please be seated.

01:33PM 20 Counsel have been working on this case for several years, and
21 I've only been exposed to it for several days. So, if you'd
22 bear with me, I have a few questions I'd like to ask of
23 Mr. Alston first. I feel that I've just gotten through,
24 perhaps, the first chapter of this, which appears to be a very
01:33PM 25 lengthy book.

1 THE COURT: Now, was the Goldman Sachs affiliate aware
2 of this alleged fraud before it purchased the properties -- or
3 before it purchased the SS companies?

4 MR. ALSTON: Right. The litigation was ongoing for a
01:45PM 5 substantial period of time before the sale of the companies
6 through the Japan bankruptcy.

7 THE COURT: And the Goldman Sachs affiliate purchased
8 the stock from the trustee in bankruptcy or the receiver or --

9 MR. ALSTON: Actually, as I understand it, it's a
01:45PM 10 little bit different than one might expect in a U.S.
11 bankruptcy. Apparently the original stock is canceled and new

12 stock is issued out of the bankruptcy. So, it's not a matter
13 of the same shares passing from one hand to another and ending
14 up in the hands of Southwind, which is the name of the Goldman
01:45PM 15 Sachs entity.

16 THE COURT: Like being born again.

17 MR. ALSTON: Somewhat, yes, uh-huh. I mean, it's not
18 the same shares that have passed through.

19 THE COURT: So, before the bankruptcy was closed,
01:46PM 20 everyone, including the external creditors, were aware of the
21 ongoing litigation in the state court?

22 MR. ALSTON: I believe so, Your Honor. I believe
23 certainly the trustee, the assistant trustee and other people
24 involved with the administration of the bankruptcy were aware
01:46PM 25 because we provided reports to them. I can't say specifically

1 chapter and verse what was told; but I believe that they all
2 were aware, yes, sir.

3 THE COURT: But as I understand it, you're not seeking
4 standing as a creditor through the external creditors or the
01:46PM 5 trustee in bankruptcy. You're seeking standing only through
6 the internal corporate loans; is that right?

7 MR. ALSTON: Well, based on the internal corporate
8 loan, that's right; but what we're saying is that Southwind has
9 succeeded to the interests controlled by the bankruptcy
01:47PM 10 trustee. And so, in that -- in that respect, he is not the
11 normal successor in interest to that -- that might be bound by
12 equitable defenses.

13 Rather, in the language of the O'Melveny case, which
14 is 61 F.3d, as Judge Kozinski put it, we are -- we are standing
01:47PM 15 here representing an innocent successor by operation of law
16 since they have succeeded to the interests of the trustee.

17 THE COURT: So, would it be fair to say that Goldman
18 Sachs' affiliate -- and their name is what?

19 MR. ALSTON: Southwind.

01:47PM 20 THE COURT: Southwind?

21 MR. ALSTON: It's a long -- it's a long name, but the
22 first --

23 THE COURT: Okay.

24 MR. ALSTON: -- the first part of it is Southwind.

01:48PM 25 THE COURT: So that when they purchased the SS

1 companies, they took into consideration that there may be some
2 further recovery in the Hawaii State Court litigation?

3 MR. ALSTON: So I would believe, Your Honor. That's
4 right.

01:48PM 5 THE COURT: And in this -- the State Court litigation
6 is now settled?

7 MR. ALSTON: The one case in State Court has been
8 settled. We're only -- at least all the monetary terms have
9 been resolved and we've recovered and sold the Maui property.
01:48PM 10 The one thing that remains there is that, as part of the
11 settlement, Satoshi Kinoshita was required to recover the data
12 on his computer that crashed and turn that over to us. And
13 that's the one small piece that remains unconcluded.

14 THE COURT: There seemed to be some allusion to -- in
01:48PM 15 one of the papers that instead of taking the \$3-1/2 million
16 cancellation fee, he took a Maui Pukalani residence.

17 MR. ALSTON: No, Your Honor. There was -- as I
18 mentioned before, there was a series of cancellation fees that
19 aggregated \$3-1/2 million. The cancellation fee on the Maui
01:49PM 20 prop -- the Pukalani property was paid in kind, if you will, by
21 giving him a residence which we subsequently sold for the
22 benefit of Southwind at a price of approximately \$575,000. And
23 so, the property was worth approximately the cash value of the
24 cancellation fee.

01:49PM 25 THE COURT: Thank you. I'll now let Mr. Marks proceed

1 with his motion.

2 MR. MARKS: Thank you, Your Honor. Your Honor, I have
3 only two very brief points to make. The first is that the law
4 does not permit a company to defraud itself and then make
01:50PM 5 itself whole from a third party.

6 Your Honor, if I may, I have a demonstrative aid that
7 might assist the Court. I've given it to Mr. Alston.

8 THE COURT: Very well. Do you have a copy for my
9 clerk, too? Thank you.

01:50PM 10 MR. MARKS: Never forget the clerk. Your Honor,
11 I've -- the facts stated on that document entitled "road map"
12 outline the key undisputed facts that are necessary in order to
13 grant this motion.

14 What the plaintiff has pled in the complaint and
01:50PM 15 conceded in discovery and further animated in the discussion
16 just now is that Toshio controlled all of the Sports Shinko
17 companies, including the creditor and the debtor; that he owned
18 all the Sports Shinko companies, including the creditor and
19 debtor; that Toshio told the Japan banks that he would sell the
01:51PM 20 Hawaii assets of Sports Shinko to pay the Japan bank creditor
21 of Sports Shinko Japan; that Toshio masterminded this grand
22 conspiracy that was supposed to net \$3-1/2 million. But
23 somehow I suppose the allegation is necessarily that Toshio
24 wasn't such a great conspirator because he only netted a house
01:51PM 25 that's apparently worth \$400,000. But apparently this

1 elaborate conspiracy was designed to defraud the Japan banks;
2 and in addition to all that, there's no dispute --

3 THE COURT: Well, while you're speaking about
4 conspiracy, when the KG defendant purchased the properties, did
01:51PM 5 they think that the prices were unreasonably below the fair
6 market value?

7 MR. MARKS: What KG believed is that they were buying
8 all the parcels, two hotels and three golf courses from a
9 company that they knew were having -- was having problems. And
01:52PM 10 they bought it in the immediate aftermath of September 11th
11 when the industry was very unstable and there were problems,
12 serious problems. They had been involved in prior
13 transactions --

14 THE COURT: What industry are you referring to?

01:52PM 15 MR. MARKS: The visitor industry, the golf industry.
16 People weren't coming to Hawaii at that point. It was a very
17 unstable market.

18 KG had also previously been involved in a transaction
19 with Shinowa on Maui where they were to buy assets there. And
01:52PM 20 it was a very long process and in the end there was a very
21 accelerated closing process and none of this seemed unusual to
22 KG.

23 They made an offer in December. The purchase and sell
24 agreement was executed some weeks later, and it closed fairly
01:53PM 25 quickly thereafter.

1 So, there is very much a question of fact about
2 whether the price paid was a fair price, especially considering
3 the sewage treatment plant; but we're willing to look past all
4 of that for the purposes of this motion, Your Honor, and
01:53PM 5 concede the facts as stated in the complaint are true.

6 THE COURT: Concede what fact?

7 MR. MARKS: That the price was too little. I mean,
8 we'll concede that for purposes of this motion. This motion
9 began as a Rule 12 motion, and we -- as more evidence was
01:53PM 10 developed to support it, it became a Rule 56 motion. And then
11 it was filed under Rule 56 because of the attachments.

12 THE COURT: I didn't hear you.

13 MR. MARKS: The motion was filed pursuant to Rule 56
14 because we had exhibits attached; but in our mind's eye as we
01:53PM 15 started this, it was a Rule 12(b)(6) motion.

16 THE COURT: What about the management agreements? Did
17 that cause you any thought, or your clients?

18 MR. MARKS: I don't believe it caused any thought at
19 all. Apparently KG was given an opportunity to agree to an
01:54PM 20 assignment of the management agreements, and it didn't. It
21 didn't accept the management agreements.

22 THE COURT: I mean, these management agreements were
23 just executed shortly before the sale, weren't they?

24 MR. MARKS: I don't know the dates of it. Probably, I
01:54PM 25 believe so. But the -- you know, the point is that the

1 management agreements were presented to KG; and if I understand
2 correctly, they declined to accept them. So --

3 THE COURT: And that caused the \$3-1/2 million fee to
4 the management company.

01:54PM 5 MR. MARKS: And KG acting in its own best interests
6 believed that it could pursue management in a more
7 cost-effective way without taking the assignment of those
8 agreements.

9 You know, there's nothing in that that I can see that
01:54PM 10 suggests any impropriety by KG at all. There were incumbent
11 managers at the golf courses and hotels. KG had the option to
12 accept or reject them, and they rejected them.

13 But most importantly, Your Honor, the sale of the KG
14 assets -- I'm sorry -- of the Sports Shinko (Hawaii) assets to
01:55PM 15 KG were specifically approved by Toshio. These are the only
16 material facts that are necessary to be -- to find in favor of
17 KG on this motion.

18 Sports Shinko's whole case presumes Toshio's complete
19 control of the Sports Shinko empire because without that
01:55PM 20 complete control, Sports Shinko Japan could not reach anywhere
21 into the corporate structure and sell remote subsidiaries'
22 assets to pay the Japan company's debts. This is, indeed, the
23 very heart of the plaintiff's case that Sports Shinko defrauded
24 itself.

01:55PM 25 This distorts fraudulent transfer law and turns it

1 into a vehicle to commit fraud rather than redress it. In a
2 fraudulent transfer case, Your Honor, at least two basic
3 showings are necessary before a transferee has exposure.

4 First, there's a creditor who is defrauded by a
01:56PM 5 debtor; and the second is an enforceable debt between them. In
6 an ordinary fraudulent transfer case, that would be an issue to
7 be contested between the parties who know about the debt, the
8 creditor and the debtor. And the transferee is insulated
9 unless there are findings that push the case toward a
01:56PM 10 fraudulent transfer case; that is, if the creditor was not
11 defrauded by the debtor or if there was no debt, there's no
12 claim against the transferee.

13 In this case where the fraud victim controls the fraud
14 perpetrator, all of this gets glossed over in a combined effort
01:56PM 15 by the debtor and the creditor to pursue the transferee. And
16 that's what's happened here. Fraudulent transfer law is turned
17 on its head, and a whole new species of fraudulent transfer
18 case is invented.

19 If Sports Shinko's theory is correct, we can expect
01:57PM 20 that sellers will sell their properties through a wholly owned
21 controlled subsidiary that is indebted to the parent company.
22 The sale will occur. The debt will not be repaid, and then the
23 seller's parent waits. And in a rising market, the seller's
24 parent then sues the buyer and picks the buyer's pocket for
01:57PM 25 additional money.

1 COURT REPORTER'S CERTIFICATE

2 I, Sharon Ross, Official Court Reporter, United
3 States District Court, District of Hawaii, do hereby certify
4 that the foregoing is a correct transcript from the record of
5 proceedings in the above-entitled matter.

6 DATED at Honolulu, Hawaii, March 24, 2005.

7

8 /s/Sharon Ross

9 SHARON ROSS

10 CSR 432, RPR, CRR

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